NO. 49417-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

IN RE THE PERSONAL RESTRAINT

OF

PATRICK McALLISTER,

Petitioner

OPENING BRIEF OF PETITIONER

John C. Cain
802 S. Second Street
Tacoma, Washington 98403
(253) 564-1879
Attorney for Petitioner
Patrick McAllister

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2. Mr. McAllister is entitled to relief from personal restraint due to violations of his right to a fair trial under the Fourteenth Amendment to the United States Constitution based on prosecutorial misconduct.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. McAllister's Sixth Amendment right to counsel was violated by the inimitable ineptitude of his defense team, including failure to undertake even a basic preparation for trial, refusal to interview defense witnesses, refusal to utilize known exculpatory evidence at trial, refusal to hire expert witnesses, refusal to call rebuttal witnesses, failure to lay a foundation for witness tampering evidence, and failure to abide by client wishes, and failure to deconstruct the State's case in cross-examining State witnesses.

2. Whether Mr. McAllister's conviction should be reversed due to prosecutorial misconduct when the State committed several *Brady* violations, elicited false testimony from witnesses, and argued facts not in evidence in closing.

C. STATEMENT OF THE CASE

The facts of this case are set out in detail in the Personal Restraint Petition and are incorporated herein by reference.

D. ARGUMENT

I. Ineffective Assistance of Counsel

The right to effective assistance of counsel in a criminal proceeding is a constitutional right, guaranteed under the Sixth Amendment to the United States Constitution as well as Article 1, Section 22 (amendment 10) of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 672, 101 P.3d 1 (2004).

A two-part test determines ineffective assistance. First, the defendant must demonstrate that counsel's conduct fell below an "objective standard of reasonableness." Legitimate trial tactics cannot serve as a basis for a claim of ineffective assistance, unless those tactics would be considered incompetent by lawyers of ordinary training and skill in criminal law. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Yet, even strategic decisions are entitled to deference *only* if they are made after **thorough investigation of law and facts** or are supported by reasonable professional judgments. *Strickland* at 690-91. [Emphasis supplied]

Second, the defendant must show that the conduct caused actual prejudice – that there is a reasonable possibility that the outcome of the proceeding would have been different if counsel had performed effectively. *State v. Thomas,* 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A claim for ineffective assistance of counsel is reviewed *de novo*. *State v. Shaver,* 116 Wn.App. 375, 382, 65 P.3d 688 (2003). Washington courts approach an ineffective assistance of counsel argument with a strong presumption that counsel's representation was effective. *State v. McFarland,* 127 Wn.2d 322, 335, 899 P .2d 1251 (1995). A defendant may "rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (citing *Strickland*, 466 U.S. at 688-89). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Id.* The remedy for ineffective assistance of counsel is remand for a new trial. *State v. Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

A. Presumptive Prejudice

Although courts will generally delve into an individualized inquiry into defense counsel's performance and resulting prejudice in analyzing counsel's effectiveness, in certain cases prejudice may be presumed. *United States v. Cronic* 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

> This presumptive prejudice rule "is limited to the 'complete denial of counsel' and comparable circumstances, including: ... (2) where **'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing'**...

In re Pers. Restraint of Davis, 152 Wn.2d 647, 673-675 (2004) (Internal citations omitted, Emphasis supplied.)

Trial counsel in this case was ineffective to the point of incompetence. Counsel utterly and completely failed "to subject the prosecution's case to meaningful adversarial testing." Counsel did not prepare adequately: he did not visit or photograph the crime scene, he did not interview defense witness until the day of trial, he did not make inquiries into crucial issues and failed to follow up on key statements made during interviews, he did not seek out – or use even when provided – necessary documents, and he did not retain vital experts. Appendix G – *Declaration of Patrick McAllister.* Counsel was not a zealous advocate at trial: he failed to point out inconsistencies in the State's case and in testimony by State witnesses, he failed to conduct meaningful cross-examination of State witnesses, he failed to put on rebuttal testimony, he stipulated to the

exclusion of evidence that was favorable to the defense, he failed to prevent an unqualified witness from testifying as an expert, and he failed repeatedly to object to blatantly improper statements and arguments.

Ronald Ness, an experienced criminal defense attorney, provided an expert opinion regarding the effectiveness of trial counsel in this case. Appendix dd. Mr. Ness reviewed several documents as part of his case review, including the defense interviews of Ms. Lorega and Mr. and Mrs. Perkins, all discovery in this case, the medical reports, and the affidavits of Dr. Nacht and Dr. Welch. Appendix dd, page 1-2. Based on his review, Mr. Ness concluded that the representation of Mr. McAllister "was deficient in many ways." *Id.,* page 2.

Based on his review, Mr. Ness opined that had defense counsel utilized medical records demonstrating Mr. McAllister's disabilities, consulted with sexual abuse experts, and utilized additional exculpatory evidence, such as telephone records, Ms. Lorega's credibility would have been "greatly impacted." Appendix dd, page 2-4. Mr. Ness noted that Ms. Lorega's credibility was crucial to this case, and undermining her credibility could have changed the outcome of the trial. *Id.* Mr. Ness concluded that the cumulative effect of defense counsel's errors "deprived Mr. McAllister of effective representation and a fair trial." *Id.* at 4.

Even counsel's theory of the case was woefully inadequate, as he attempted to show that Mr. McAllister and Ms. Lorega had a relationship that simply didn't work out, rather than showing the case for what it was – a somewhat naïve older man who had fallen prey to the wiles of a woman whose only aim was to gain entry into the United States. In sum, counsel's lackluster efforts are best read as a primer on how not to defend a felony.

The errors committed by trial counsel combined to utterly and completely deprive Mr. McAllister of any meaningful defense, and prevented him from availing himself to his Sixth Amendment right to counsel. Prejudice must be presumed, and a new trial granted.

B. Specific Grounds for relief based on ineffective assistance raised on appeal

Even if a petitioner has raised an ineffective assistance of counsel claim on direct review, the Court may consider a new ground for an ineffective assistance of counsel claim for the first time on collateral review. *E.g. In re Pers. Restraint of Brett*, 142 Wn.2d at 873 (*rev'd on other grounds Brett*, 126 Wn.2d 136. If a petitioner has not had a previous opportunity to obtain a meaningful judicial review, the Court will not apply the heightened standard generally applied to personal restraint petitions. *Personal Restraint of Coats*, 173 Wn.2d 123, 132, 267 P.3d 324 (2011); *Personal Restraint of*

Isadore, 151 Wash.2d 294, 299, 88 P.3d 390 (2004). Instead, a petitioner need only establish the level of prejudice required by *Strickland.*

Collateral review must be available in those cases in which petitioner is actually prejudiced by an error that may have been raised previously. *In re Haverty,* 101 Wn.2d 498, 681 P.2d 835 (1984). The mere fact that an issue was raised on appeal does not automatically bar review in a PRP. *In re Taylor*, 105 Wn.2d 683, 687 (1986). Should doubts arise as to whether two grounds are different or the same, they should be resolved in favor of the applicant. *Id.* at 688.

If the petitioner seeks renewal of an issue rejected on its merits on appeal, the petitioner must demonstrate that the ends of justice would be served by review of the issue. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999); *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 473, 965 P.2d 593 (1998). Several issues raised herein were raised to some degree on direct appeal. However, evidence to support these claims lies outside the record or is newly discovered. Thus, renewed review is in the interest of justice.

i. Failure to investigate exculpatory evidence prior to trial

Counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary." *In re Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992). In an ineffective

assistance case, the court assesses a decision not to investigate for reasonableness under all the circumstances. *Rice*, 118 Wn.2d at 889.

A defendant seeking relief under a theory that trial counsel failed to properly investigate his case must show, at a minimum, that there is a reasonable likelihood that the investigation would have produced "useful information not already known to the defendant's counsel." *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001), *amended by* 253 F.3d 1150 (2001). Ignorance of the law or inadequate investigation, rather than deliberate choice resulting in the failure to present an available theory of the defense, can lend support for the granting of a new trial. *Brubaker v. Dickson,* 310 F.2d 30 (9th Cir. 1962), *cert. denied,* 372 U.S. 978, 10 L. Ed. 2d 143, 83 S. Ct. 1110 (1963); *In re Saunders,* 2 Cal. 3d 1033, 472 P.2d 921, 926-27, 88 Cal. Rptr. 633 (1970); *People v. McDowell,* 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968); *People v. Ibarra,* 60 Cal. 2d 460, 386 P.2d 487, 490-91, 34 Cal. Rptr. 863 (1963).

In *Sims v. Livesay*, 970 F.2d 1575 (6th Cir. 1992), defense counsel failed to investigate or introduce into evidence an FBI report revealing that there was gunpowder residue on the quilt on the victim's bed, contradicting the government's theory that the victim was shot from a distance, and supporting the defendant's story that his wife had been attempting to commit suicide and he had grabbed the gun as she turned it on herself. *Id.*

at 1576-77, 1580. The conviction was reversed due to ineffective assistance as defense counsel failed to investigate or use the report. *Id.* at 1580-81.

In *Cannedy v. Adams*, 706 F.3d 1148 (9th Cir. 2013), counsel was found to be ineffective for ignoring evidence that the victim of defendant's alleged lewd and lascivious acts had recanted her allegations in an Internet posting to a friend. *Id.* at 1161. The trial was based largely on credibility determinations, as there was no physical evidence linking the defendant to the alleged abuse. The defendant maintained that the victim had fabricated the allegations; thus the Internet posting was crucial as it explained the victim's motive for her false claims. *Id.* The Court found that "[n]o competent lawyer would have declined to interview such a potentially favorable witness..." given clear identification, availability, and willingness to testify. *Id.*

Defense counsel committed all of the errors in the preceding cases, and more. He did not even so much as visit the crime scene. Appendix G. The State claimed that Lorega was held in isolation at Mr. McAllister's home. Appendix F at 665:12. In fact, Mr. McAllister lives near other homes. Appendix G, page 4. The lane leading to his road passes a house within easy walking distance. *Id.* Photographs of the neighborhood would have demonstrated the falsity of the State's assertions of isolation.

Counsel failed to undertake a tour of the interior of the home. Appendix G, page 4. Ms. Lorega claimed Mr. McAllister had forced sex upon her in the bathtub. Appendix F at 328:8-15. Photographs of the scene of this alleged rape, in conjunction with the unused medical records, would have demonstrated the impossibility of this claim. Appendix G, page 4. But counsel did not understand that this incident was impossible, and was thus unable prove it, as counsel had no knowledge of the crime scene.

Additionally, notations by Detective Garrett and Nurse Culbertson tell of an initial exam undertaken by Ms. Lorega before Harrison Hospital examination. Appendix K, at 6. Counsel failed to take action to obtain a copy of the exam records. It is true that the failure of the State to turn over the records was a potential *Brady* violation, but defense counsel was also obligated to investigate potentially useful evidence. Appendix dd at 5.

Counsel likewise failed to follow up on claims by Mr. Sabiniano's allegations of witness tampering, not even gathering sufficient evidence to make an offer of proof of this evidence at trial. Appendix F at 452-53. As argued below, a police report substantiating Mr. Sabiniano's claims went unused at trial to demonstrate the relevance of Mr. Sabiniano's testimony. Appendix G – *Declaration of John Cain*. This testimony would have cast grave doubts on the truthfulness of Ms. Lorega's claims and likely changed the course of the trial.

Counsel also failed to obtain photographs of the embassy lobby that would have demonstrated that the "machine" Ms. Lorega described did not exist, and furthermore that no cell phones were allowed in the embassy.

Counsel further failed to adequately investigate the immigration implications of this case. While counsel hired an expert to testify, the testimony was of little use, as counsel was unprepared to ask vital questions, including asking the expert to compare wait times for types of visas and establish that the method utilized by Ms. Lorega was the only fast track to immigration. Appendix G.

Finally, counsel was in possession of Ms. Lorega's diary but declined to have it translated or even determine the language – Tagalog – in which the diary was written. Ms. Lorega's knowledge of Tagalog was thus not used to impeach her claims that she could not understand her Tagalog interpreter, nor were her complaints in her diary used to impeach her assertions that she was happy in her life in the Philippines.

The evidence that counsel failed to pursue or utilize in this case would have supported Mr. McAllister's claims, would have impeached key State witnesses and would have changed the outcome of the trial.

ii. Failure to obtain and introduce known exculpatory evidence

An attorney breaches his duty to a client if he fails "'to make reasonable investigations or to make a reasonable decision that makes

particular investigations unnecessary.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (quoting *Strickland*, 466 U.S. at 691). "Not conducting a reasonable investigation is especially egregious when a defense attorney fails to consider potentially exculpatory evidence" *Davis*, 152 Wn.2d at 721. A claim of ineffective assistance based on a duty to investigate must be considered in light of the strength of the government's case. *Davis*, 152 Wn.2d at 722 (quoting *Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001)).

Counsel utterly failed and refused to consider a multitude of exculpatory evidence in this case. Counsel refused to use Mr. McAllister's medical records at trial, despite assuring his client that he would do so. Appendix F. Counsel also refused to engage an expert to testify regarding Mr. McAllister's physical limitations. *Id.* As demonstrated by the declaration of Mr. McAllister's personal physician, Dr. Nacht, medical records introduced and explained by an expert would have established that McAllister was incapable of assaulting Ms. Lorega as she alleged, was likely incapable of holding her down as described, and was utterly incapable of raping her in the bathtub. Appendix W – *Declaration of Dr. Nacht.*

Medical records would have also established that Mr. McAllister was free of STDs. Appendix G. That counsel did not use these records is explainable by his strategy of excluding STD evidence. However, the latter

strategy is inexplicable, considering the evidence that Mr. McAllister could not have infected his fiancé with the diseases she was found to carry.

Finally, the records of Mr. McAllister's examination by a doctor on behalf of the Department of Labor and Industries would have conclusively established that he was truly injured and unable to work. *Declaration of Richard Thorson,* attached hereto as Appendix X. This evidence was crucial because it would have established the falsity of Mr. Perkins' highly inflammatory and damaging allegation that Mr. McAllister was trying to "scam" L&I. Appendix F at 584:7-15.

The use at trial of medical records, introduced through competent expert testimony, would have eviscerated key portions of Ms. Lorega's testimony and cast significant doubt on the remainder. The State wasted no time pointing out counsel's failure to establish a foundation for Mr. McAllister's claims of disability by pointing out the missing medical records and expert medical testimony to the jury in closing argument. Appendix F at 689:23-690:6. The lack of records not only failed to help exonerate Mr. McAllister, but became a tool for the State to further damn him. *Id.* The failure of counsel to utilize the records cannot be explained by trial strategy and is simply confounding, as no valid strategy allows the exclusion of dispositive exculpatory evidence.

Counsel further failed to obtain or utilize telephone records demonstrating that Ms. Lorega called friends and relatives from Mr. McAllister's home, or that Ms. Lorega's entire story about calling 911 on the day that she left Mr. McAllister was fabricated. Ms. Lorega told quite a tale during the defense interview, claiming it was a miracle she knew the word "abuse" and was able to use it when calling the police on April 26. Appendix U. Ms. Lorega further claimed at trial that she had called 911 at her sister's insistence. Appendix F at 336:22-23. Yet, telephone records would have shown that such a phone call never took place. Appendix G. Telephone records would have been of significant impeachment value in this case, casting doubt on Ms. Lorega's credibility as a whole. No known trial strategy explains counsel's failure to utilize these records.

Counsel did not even use the records he already had to make this point, showing that he failed to even investigate the discovery that was in front of him. Records provided to the defense by the Department of Homeland Security contained an admission by Ms. Lorega that Mr. McAllister's home had neighbors nearby – a statement that would have greatly undermined the State's attempt to paint a picture of Ms. Lorega as isolated. Appendix K at 363. Counsel failed and refused to use these reports as impeachment evidence, showing he likely had not read them.

Counsel failed and refused to utilize computer records showing that Temur Perkins had booked a flight for Mr. McAllister to the Philippines. Appendix J, paragraphs 5-6. This record would have helped to demonstrate Mr. Perkins' significant role in bringing Mr. McAllister and Ms. Lorega together, and helped to establish him as a mastermind behind the plot to keep Ms. Lorega in the United States through false allegations of abuse.

Finally, counsel refused to use receipts from Western Union that would have demonstrated that Mr. McAllister sent Ms. Lorega sums vastly exceeding the few thousand dollars she claimed. Appendix K at 188. When tallied, the receipts show that in excess of $8,000.00 (eight thousand dollars) was sent to Ms. Lorega prior to her arrival in the United States. Appendix G, paragraph 7. Despite this, Ms. Lorega arrived with only the clothes on her back. *Id.* This evidence would have further decimated Ms. Lorega's claims, and highlighted the fabrications in which she engaged throughout this case. The evidence supported Mr. McAllister's innocence and would have affected the outcome of this trial.

iii. Failure to lay a foundation for witness tampering evidence

Counsel's failure to properly employ relevant law and court rules can constitute deficient performance. *See State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993) (counsel deficient where he failed to object

to highly prejudicial evidence); *State v. Carter*, 56 Wn. App. 217, 224, 783 P.2d 589 (1989) ("An attorney is presumed to know the rules of the court.").

Due process guarantees an accused person a meaningful opportunity to present a complete defense. U.S. Const. Amend. XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d. 503 (2006). This includes the right to introduce relevant and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007). The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010). The Sixth and Fourteenth Amendments protect a defendant's right to expose the bias of adverse witnesses through independent evidence. *State v. Spencer* 111 Wn. App. 401, 408, 45 P.3d 206 (2002).

Counsel made a cursory attempt to bring in evidence that Mr. Sabiniano had been threatened by Ms. Lorega's relatives should he testify for Mr. McAllister. Appendix F at 452:25-453:3. The Court ruled the evidence irrelevant. *Id.* at 453:4-5. Counsel simply dropped the issue, making no effort to argue for the relevancy of the evidence or to bring in substantiating documents. *Id.*

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." ER 401. Counsel had no offer of proof ready to argue in opposition to the State's objection or the court's ruling regarding the relevancy issue. Appendix F at 453. The fact that a witness was discouraged from testifying was obviously relevant to what should have been the core issue at trial – that Ms. Lorega was fabricating claims of rape and assault to stay in the country, as well as to establish Ms. Lorega's bias against Mr. McAllister. Counsel mentioned neither ground for admission, nor did he provide documentary evidence supporting Mr. Sabiniano's claim. Appendix F at 453. Using the evidence in a motion for a new trial was insufficient to cure counsel's deficient trial performance.

This issue was raised by appellate counsel on direct review in a hybrid court error/ineffective assistance argument, and the Appellate Court addressed the issue purely under the umbrella of ineffective assistance. Appendix C at 35-37, 43-44, Appendix D at 16. The Court found it sufficient that the issue had been raised by the defense and considered by the trial court, both in trial and in a defense motion for a new trial. Appendix D at 16. The Court held there was no evidence the trial court would have ruled differently had counsel presented this evidence at trial. *Id.*

Petitioner argues, with all due respect, that the Appellate Court's ruling missed the mark. The Court was correct that the lack of this particular piece of evidence would likely be insufficient to overturn the conviction.

However, the evidence, properly presented at a trial properly defended, and admitted for impeachment purposes, would have unquestionably added to the multitude of evidence that Ms. Lorega had fabricated her allegations. Counsel's failure to have an offer of proof ready to introduce this evidence further highlights his utter and complete failure to prepare for trial.

A properly prepared attorney would have introduced not only Mr. Sabiniano's testimony, but the police report filed by Mr. Sabiniano after the incident, along with a card handed to Mr. Sabiniano by one of his assailants. These documents, together with testimony, inextricably linked the attack against Mr. Sabiniano to Ms. Lorega. But these documents were not presented, and trial counsel failed to argue that the attack was relevant as evidence of witness bias, as well as being evidence that Ms. Lorega was being less than candid toward the tribunal. This issue was not considered as part of a larger picture of trial counsel's unpreparedness, and accordingly was not examined by the Appellate Court in this light. This issue should be reviewed and further considered in the interest of justice.

C. Additional Grounds for finding of ineffective assistance not raised on direct appeal

i. Failure to interview witnesses

There is no absolute requirement that defense counsel interview witnesses before trial, and counsel is not automatically deemed ineffective

for having elected not to do so. But a failure to conduct an appropriate pre-trial investigation, including failure to interview witnesses, that results in a demonstrated unpreparedness for trial will be deemed ineffective assistance. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991); *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302, *rev. denied*, 90 Wn.2d 1006 (1978).

In *Jury,* the Court determined that the record showed that defense counsel did not interview witnesses, made "virtually no factual investigation of the events leading to defendant's arrest," and admitted he was unprepared for trial. *Id.* The Court noted that counsel is "not expected to perform flawlessly or with the highest degree of skill. But he will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner." *Id., quoting State v. White,* 5 Wn. App. 283, 286-87, 487 P.2d 243 (1971), *rev'd on other grounds,* 81 Wn.2d 223, 500 P.2d 1242 (1972). The Court concluded that counsel's failure to interview witnesses, subpoena witnesses, and inform the court of the substance of witness testimony were "omissions which no reasonably competent counsel would have committed." *Id.* at 264.

The *Jury* Court contrasted the case before it with cases in which no *formal* witness interviews were conducted but counsel nonetheless was well prepared for trial. *See, e.g., In re Personal Restraint of Pirtle*, 136 Wn.2d

467, 488, 965 P.2d 593 (1998), (counsel "spent considerable time reviewing evidence and obtaining answers to various questions" from detectives, and defendant failed to show inadequacies of counsel's approach.); *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 754-57, 16 P.3d 1 (2001) (counsel relied on investigator's pre-trial interview of medical examiner, and resulting difficulties in cross-examination were due to difficulties of witness, not lack of preparation.)

Further, counsel has a duty to provide competent representation to a client. "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1. In the comments to this rule, the Supreme Court observed that correct handling of a matter includes adequate preparation.

There is no evidence that trial counsel interviewed any of the defense witnesses until just moments prior to their testimony. Given the direct examination of expert witness Elizabeth Li, it cannot even be said with certainty that this witness was interviewed prior to trial. As to the remainder, Mr. McAllister's witnesses reported that a single group interview was conducted in the lobby of the courthouse as witnesses were preparing to enter the courtroom. Appendix G at paragraph 19; Appendix Q, *Declaration of Kelly Darby,* at paragraph 3; Appendix R, *Declaration of Arthur Mina* at paragraph 4; Appendix S, *Declaration of Kay Peterson* at

paragraph 4; Appendix T, *Declaration of Doug Peterson* at paragraph 4. Counsel failed to gather key information that would have been useful to the defense, and failed to even prepare witnesses for their testimony. This is reflected in the inability of several witnesses to remember Ms. Lorega's name, the failure of counsel to ask several witnesses about Mr. McAllister's medical issues, and the failure of the witnesses to be able to testify about specific dates of events in a cohesive manner, as the State pointed out in closing, noting that the defense witnesses couldn't get their stories straight. Appendix F at 661:11-12.

Meaningful witness interviews would likewise have revealed that all of Mr. McAllister's friends who testified on his behalf were aware of his physical limitations and prepared to testify as to their knowledge of his injuries and subsequent medical interventions. Appendix G at paragraph 19; Appendix Q, *Declaration of Kelly Darby,* at paragraph 3; Appendix R, *Declaration of Arthur Mina* at paragraph 4; Appendix S, *Declaration of Kay Peterson* at paragraph 4; Appendix T, *Declaration of Doug Peterson* at paragraph 4. All had seen him limp and use a cane. *Id.* All had seen him in an ankle brace. *Id.* Many of these observations were made within the same time period as the allegations in this matter. *Id.* The testimony would have bolstered Mr. McAllister's reports regarding his physical disabilities, and impeached claims by Ms. Lorega and Mr. Perkins that Mr. McAllister was

physically fit and perhaps even faking his injuries. Appendix F at 603:26 (claiming Mr. McAllister could jump); 584:7-13 (claims that Mr. McAllister was trying to deceive the Department of Labor and Industries.)

Even counsel's formal interviews of the State's witnesses are of limited value. Counsel does not appear to have prepared for the interviews, including reading the discovery beforehand, as he was unable to either ask pertinent questions to undermine Ms. Lorega's claims, or to seize upon unexpected information when it arose. For example, both Ms. Lorega and Mr. Perkins talked about Ms. Lorega's new boyfriend, Andrew. Appendix U at 75:20-76:23; Appendix cc at 40. Counsel made no effort to follow up on this reference. Nothing was asked of Mr. Perkins or Ms. Lorega regarding the identity of this person, where he came from, how he and Ms. Lorega had met, or when the relationship began. This would have been of significant value in impeaching Ms. Lorega, particularly as she claimed to be angry and afraid of men as a result of Mr. McAllister's alleged crimes against her. Appendix N, *Translations of Ms. Lorega's Diary.*

vi. Failure to hire expert witnesses

An attorney's decision regarding whether or not to call a witness to testify is generally considered "a matter of legitimate trial tactics," which "will not support a claim of ineffective assistance of counsel." *State v. Byrd*, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). A petitioner can overcome

this presumption by demonstrating that counsel failed to adequately investigate or prepare for trial. *Byrd*, 30 Wn. App. at 799.

However, "[i]n sexual abuse cases, because of the centrality of medical testimony, the **failure to consult with or call a medical expert is often indicative of ineffective assistance of counsel.**" *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir. 2005) [emphasis supplied] (citing *Eze v. Senkowski*, 321 F.3d 110, 127-28 (2d Cir. 2003); *Pavel v. Hollins*, 261 F.3d 210, 224 (2d Cir. 2001); *Lindstadt v. Keane*, 239 F.3d 191, 201 (2d Cir. 2001)). "This is particularly so where the prosecution's case, beyond the purported medical evidence of abuse, rests on the credibility of the alleged victim, as opposed to direct physical evidence such as DNA, or third party eyewitness testimony." *Id.*

This case is on point with *Gersten* and *Eze*. Trial counsel failed and refused to hire any expert witnesses save an immigration attorney, who was useless at best. No medical witnesses were utilized to bring in Mr. McAllister's medical records so as to explain Mr. McAllister's physical limitations and demonstrate the physical impossibility of the claimed assaults and rapes against Ms. Lorega. This evidence would have had a significant impact on Ms. Lorega's credibility. As is clear from the proposed testimony of Mr. McAllister's personal physician, testimony from this doctor would have laid out to the jury in explicit terms the impossibility

of Ms. Lorega's many claims of assault. Appendix W. This is not a theoretical assumption of the testimony that might have been elicited, as Dr. Nacht has stated in no uncertain terms the precise testimony he would have offered. *Id.* This testimony would have only been strengthened by the medical records from Dr. Thorson, whose findings were similar. Appendix X. Knowing that Mr. McAllister was physically incapable of the vast majority of the allegations made by Ms. Lorega would have influenced the outcome of the trial.

Trial counsel also failed and refused to hire a sexual assault expert to rebut claims made by the State's so-called experts. A sexual assault expert would have cast doubt upon the unqualified opinions given by the State's experts that the bruising seen on Ms. Lorega was consistent with sexual assault. Appendix Y, *Declaration of Phillip Welch.* An expert would have testified that the bruising observed could not have been from assaults months earlier, a concern that was brushed off by the State's expert. *Id.* Finally, a sexual assault expert would have been in a position to review the medical reports and testify as to the lack of evidence of sexual assault, in direct opposition to testimony at trial. *Id.* The negation of unequivocal evidence of sexual assault would have reduced Ms. Lorega's allegations to mere claims made by a woman who defense counsel could, and should, have

proven to be unreliable and incredible. This testimony too would have influenced the outcome of this trial.

iii. Failure to effectively cross-examine and impeach State witnesses

Cross-examination is a fundamental part of the right to confrontation guaranteed by the Sixth Amendment and is the principal means by which a party may test witness credibility. *Davis v. Alaska,* 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Darden,* 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The extent of cross-examination, however, is generally considered a matter of judgment and strategy. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Even so, ineffective assistance of counsel may be found based on trial counsel's decisions during cross-examination if counsel's performance fell below the range of reasonable representation. *Davis*, 152 Wn.2d at 720.

To establish prejudice for failure to effectively cross-examine a witness, the defendant must show that the testimony that would have been elicited on cross-examination could have overcome the State's evidence against the defendant. *Davis*, 152 Wn.2d at 720; *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007).

What cross-examination that did take place in this case was cursory at best. Ms. Lorega's story was ever-changing; she first claimed she was

raped five times, but by trial claimed she was raped over thirty times, sometimes multiple times a day. Appendix K at 269; Appendix F at 313:15-334:2. In one interview, Ms. Lorega actually changed her story within the course of a few questions, from telling the detective that Mr. McAllister never asked for anal sex to claiming that he had attempted it, all prompted only by the detective continuing to ask if she was sure of her statement. Appendix K at 23. The cross-examination utterly failed to demonstrate Ms. Lorega's propensity to change and embellish her testimony.

Ms. Lorega was not cross-examined regarding her ability to speak English prior to coming to this country, contrasted with her complete inability to communicate in anything but her claimed native tongue of Waray-Waray after the alleged crimes were perpetrated. It is settled that Mr. McAllister and Ms. Lorega communicated in English over the phone, and Ms. Lorega testified that she learned English in school in the Philippines. Appendix F at 294:24-25. Yet after the alleged rapes, she suddenly lost all ability to communicate in any language except Waray-Waray, and even that she could apparently speak only with a certified court interpreter, not with her sister who also spoke the language. Ms. Lorega was never questioned as to how this came to be, given her previous fluency in several languages.

Counsel was able to elicit an admission that Ms. Lorega was fluent in Tagalog. Appendix F at 367. Yet, counsel did nothing with this admission, including asking Ms. Lorega just how it was that she could not understand a Tagalog interpreter during investigative interviews. Her own journals were written in Tagalog, but Ms. Lorega was never asked why she wrote in this second language when she denied being able to speak it through a translator after she was allegedly raped, or why she failed to keep journals in her native language, which has a written component. *Id.*

Ms. Lorega was not cross-examined regarding interviews in which she admitted some sexual contact with Mr. McAllister during his visit to the Philippines, contrary to trial testimony. Appendix K at 57; Appendix F at 304:25-305:5. New in trial testimony was a claim that Ms. Lorega had been left alone overnight for five nights – a statement that could have been proven false not only with an effective cross-examination, but by rebuttal witnesses. Appendix F at 323:12-17.

The defense likewise did not cross-examine or impeach Ms. Lorega's description of an intricate machine in the United States embassy that secured interviewees possessions while visa interviews were conducted. Counsel failed to use embassy letters in his file explicitly stating that all belongings must be left outside the embassy as no holding facilities

existed, and did not obtain a picture of the interior of the embassy lobby. Appendix F at 605:24-606:5.

Finally, Ms. Lorega's desperation to remain in the United States was not brought out in cross-examination. Appendix F at 335:21-357:16. On direct examination, Ms. Lorega testified that after the alleged assaults and rapes, she only wanted to return to the Philippines, but that her sister convinced her to stay and prosecute Mr. McAllister. Appendix F at 339:1-11. On cross-exam, when Ms. Lorega testified that she could not remember that she had previously testified she wanted to stay in the United States if there was a way, the subject was changed. Appendix F at 335:21-357:16. Counsel did not impeach her with her own statement, made to her sister, that she would "rather die" than return to the Philippines. Appendix aa.

Other than a few minor discrepancies, the only significant cross-examination of Ms. Lorega involved a love letter Ms. Lorega wrote in Tagalog to a man she called her husband. Appendix F at 360-361. Ms. Lorega admitted that the letter was not written to Mr. McAllister. *Id.* After this bombshell, defense counsel again fell silent. No further questions were asked. Instead, the witness was passed and rehabilitated. *Id.*

Counsel failed to conduct effective cross-examinations of any of the other State witnesses. Like Ms. Lorega, her brother-in-law and key witness Temur Perkins had an ever-changing account of the events as they unfolded,

and told different stories in interviews than in trial. For instance, though Mr. Perkins was questioned regarding his new claim at trial that he had offered to purchase a ticket back to the Philippines for Ms. Lorega, the subject was changed as soon as Mr. Perkins averred he had made the statement in the past. Appendix F at 249. Counsel failed to impeach Mr. Perkins regarding his claim that Ms. Lorega had called 911 – just as he failed to impeach Ms. Lorega when she made the same claim, despite his possession of the CAD report, which plainly shows that only one 911 call was made, from Mr. Perkins' residence. Appendix bb.

Detective Garrett was not questioned to any extent regarding the inconsistencies in Ms. Lorega's stories and any suspicions that would normally be drawn by a police detective about such a vastly changing narrative. The detective's claims that the changes were due to Ms. Lorega's language difficulties were unchallenged. Appendix F at 290. The detective was not cross-examined regarding Mr. Perkins' active role in her investigation, including the numerous emails between Mr. Perkins and the detective that showed the influence Mr. Perkins wielded over Ms. Lorega's testimony – influence that should have alerted the detective to the probability that Ms. Lorega's claims were fabricated.

Officers who responded to the scene were likewise not cross examined regarding Ms. Lorega's claim to them that she had not been

assaulted, again demonstrating that Ms. Lorega's claims had become ever more damning with time. Appendix K at 270.

Finally, counsel utterly failed to point out the sudden resurrection of Mrs. Perkins' memory. Contrary to her interviews, when Mrs. Perkins was able to recall little to nothing of the events leading up to her sister's arrival in the United States and her alleged abuse while in the country, suddenly at trial Mrs. Perkins had a fully developed, detailed, and damning story that meshed perfectly with accounts told by her sister and her husband.

Had trial counsel performed effectively during cross-examination, the inconsistencies in Ms. Lorega's story would have been made clear to the jury. The detective would have been forced to admit that such inconsistencies in a witness are troubling at best. Effective cross-examination, including impeachment with prior interviews and documents, would have laid bare the portions of Ms. Lorega's story that went beyond inconsistencies to outright lies. Yet the jury saw none of this because trial counsel was unprepared with marked copies of interviews, impeachment documents, or an apparent working knowledge of the discovery in this case, such that he was unable to point out the numerous times that Ms. Lorega, Mr. Perkins, and others changed their story.

iv. Failure to call rebuttal witnesses

As further evidence of trial counsel's utter failure to be ready for trial in this matter, not a single rebuttal witness was called in Mr. McAllister's defense. Mr. Sabiniano, for instance, could have testified as to the appearance of the interior of the United States embassy in the Philippines and brought a photograph of the lobby, proving Ms. Lorega's description of the machine that held her phone was a lie. This also would have lent credibility to Mr. Sabiniano's testimony that he answered Ms. Lorega's phone to a call from her boyfriend. Both the lie and the phone call would have cast further doubt on Ms. Lorega's truthfulness.

Mrs. Omana, prepared with phone records, could have shown how often she and Ms. Lorega spoke on the phone, demonstrating that Ms. Lorega was not by any means deprived of human contact. Mr. Omana could have established the dates of trips taken by the two couples through bank receipts, showing that alleged rapes on certain dates were virtually impossible. Properly prepared, all of this testimony would cumulatively have proven that Ms. Lorega fabricated her claims of abuse with the sole aim of staying in the country.

Finally, claims made by both Ms. Lorega and Mr. Perkins that Mr. McAllister was not in the least disabled – including a reference by Mr. Perkins that his appearance was a scam he was trying to perpetrate on the Department of Labor and Industries and a claim by Ms. Lorega that Mr.

McAllister could jump – would have been utterly destroyed by testimony from Mr. McAllister's friends and his doctor, together with his medical records, none of which defense counsel deemed necessary to the case, and all of which led to Mr. McAllister's wrongful conviction.

vii. Failure to abide by a client's decisions

Pursuant to RPC 1.2(a), a lawyer has an obligation to abide by a client's decisions "concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

Though Mr. McAllister and Mr. Hester clearly agreed on the objectives of representation in this case – acquittal – they disagreed as to how best to pursue that objective. Defense counsel refused to consider or utilize Mr. McAllister's theory of the case, a decision that ultimately led to Mr. McAllister's conviction. Appendix G. Counsel further refused to allow Mr. McAllister to testify as he wished, including allowing him to relate to the jury his experience with Ms. Lorega as a sexually aggressive young woman, telling Mr. McAllister he would withdraw as counsel if Mr. McAllister were to testify in this manner. *Id.* The jury therefore never heard evidence that Mr. McAllister believed was key to his case and which, in fact, could have created reasonable doubt in this matter.

II. Prosecutorial Misconduct

A. Brady Violations

Under Criminal Rule (CrR) 4.7, the prosecutor is directed to disclose to the defendant materials and information "within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged." CrR 4.7(3). Additionally, CrR 4.7(c) requires the prosecuting attorney to disclose relevant information and material regarding specified searches and seizures, and CrR 4.7(e) authorizes the court to order disclosure of any other relevant material. CrR 4.7(e)(1).

The purpose of discovery rules in a criminal context is to prevent defendant from being prejudice by surprise, misconduct, or arbitrary action by government. *State v. Cannon,* 130 Wash.2d 313, 922 P.2d 1293 (1996). The United States Supreme Court has expressed the philosophy behind rules such as 4.7: "The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played." *Williams v. Florida*, 399 U.S. 78, 82, 90 S.Ct. 1893, 1896, 26 L.Ed.2d 446 (1970).

A prosecutor must resolve questions of doubt regarding disclosure in favor of disclosure to the defense. *United States v. Agurs*, 427 U.S. 97, 108 (1976). As the Supreme Court pointed out in *Berger v. United States*, 295 U.S. 78, 88 (1935), the prosecutor's interest is not in winning a case, but seeing that justice is done.

Although the duty of disclosure is limited to information within the knowledge, possession or control of the prosecutor, it extends to agents acting under the prosecutor's authority. *Berger*; citing *State v. Vaster*, 99 Wn.2d 44, 53 (1983). The prosecutor has a duty to learn of favorable evidence known to agents acting under the his/her authority, including the police. *Id*; *citing Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 1555 (1995).

At a minimum, CrR 4.7(3) requires the prosecutor to disclose the type of information required under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). (*State v. Greiff*, 141 Wn.2d 910, 10 P.3d 390 (2000); *State v. Bartholomew*, 98 Wn.2d 173, 205, 654 P.2d 1170 (1982), *rev'd on other grounds*, 463 U.S. 1203, 103 S.Ct. 3530 77 L.Ed.2d 1383 (1983) (The State's disobedience to a discovery rule can constitute a violation of a defendant's right to due process)). *Brady* evidence is implicit, if not directly incorporated by CrR 4.7(3), so that failure to disclose such evidence is inconsistent with, violative of, Washington's discovery rules.

A *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused. *Brady,* 373 U.S., at 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215. The *Brady* duty extends to impeachment evidence as well as exculpatory evidence, *United States v. Bagley,* 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985), and *Brady* suppression

occurs when the government fails to turn over even evidence that is "known only to police investigators and not to the prosecutor," *Kyles,* 514 U.S., at 438, 115 S. Ct. 1555, 131 L. Ed. 2d 490. *See id.*, at 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490. "Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,'" *Strickler v. Greene,* 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (quoting *Bagley, supra, at* 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (opinion of Blackmun, J.)), although a "showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," *Kyles,* 514 U.S., at 434, 115 S. Ct. 1555, 131 L. Ed. 2d 490. The reversal of a conviction is required upon a "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id., at* 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490.

Further, where the defendant has expressly requested that the prosecutor provide specific information and the prosecutor has refused, the conviction must be set aside if "the suppressed evidence might have affected the outcome of the trial." *United States v. Agurs, supra*, 427 U.S. at 104, 96 S.Ct. at 2398; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). In *Agurs* the Court reasoned:

> (I)f the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable.

427 U.S. at 106, 96 S.Ct. at 2399.

These principles apply both to materials going to the heart of the defendant's guilt or innocence and to materials that may alter the jury's judgment of the credibility of a significant prosecution witness. *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972); *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).

The Ninth Circuit Court of Appeals found that the government's failure to turn over material regarding the mental state and credibility of a jailhouse informant constituted a clear *Brady* violation. *Gonzales v. Wong*, F.3d, 2011 U.S. App. LEXIS 24191, 2011 WL 6061514 (9th Cir. 2011). The withheld information included reports indicating that the informant had a severe personality disorder, was mentally unstable, was possibly schizophrenic, and had repeatedly lied and faked suicide attempts to obtain transfers to other facilities. *Id.* The Court found these reports may have been helpful to the defense and there was a reasonable probability of a different result if they had been made available. *Id.*

The materiality of a *Brady* violation is a mixed question of law and fact which is reviewed *de novo* by the appellate Court "by applying the reference hearing facts to the law and drawing our own legal conclusions." *In re Personal Restraint of Stenson*, 174 Wn.2d 474, 276 P.3d 286 (2012). To this end, the trial court's conclusions regarding materiality are reviewed *de novo,* but that court's underlying factual findings are reviewed for substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. *Halstien*, at 129.

When an appellate court determines whether exculpatory evidence is "material" under *Brady*, it must determine whether, had the defense been able to present that evidence to the jury, any juror might have had a reasonable doubt as to guilt. *United States v. Agurs*, 427 U.S. 97, 112-13, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) ("if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed").

Relevant impeachment evidence has been found to undermine confidence in the outcome of a trial when there was no physical evidence of the crime. *State v. MacDonald,* 122 Wn. App. 804; 95 P.3d 1248 (2004). In *MacDonald,* the defendant was charged with rape based solely on claims

of the alleged victim. *Id.* There was no physical evidence of rape, and Mr. MacDonald was convicted based on victim testimony. *Id.* at 810. It was later discovered that the State had evidence that would have impeached the victim's credibility. *Id.* at 809. The Court found that the evidence

> creates a reasonable probability that the outcome of the proceeding would have been different had the jury heard the information. Withholding relevant material impeachment evidence from the defense and the jury undermines confidence in the outcome of the trial and violates due process.

MacDonald, 122 Wn. App. at 810. The Court reversed the conviction and remanded for a new trial. *Id.*

Here, an affidavit composed by trial counsel in the days following Mr. McAllister's conviction demonstrates that no less than seventeen (17) pieces of evidence were withheld from the defense prior to trial. Appendix M. One of these is page three of a three-page statement purportedly written by Ms. Lorega. *Id.* at Exhibit 3. The first two pages were turned over to the defense, with a note on page two that page three had never been received by the PA's office. No follow up response is in the record or was provided to the defense, leading the defense to conclude that the third page never surfaced. A review of the state's documents obtained post-trial, however, demonstrates that Detective Garrett had this statement in her possession no

later than May, 2010, but that the statement in its entirety was never provided to the defense. Appendix K at 281.

The statement is significant not because of its content but due to the sophistication with which it was written – using the English language in a fashion that a woman new to the language would not be expected to know. The statement in its entirety would have been useful impeachment evidence, had defense counsel been able to demonstrate that Ms. Lorega was not its author.

Also included in these documents are a number of emails sent by Mr. Perkins to both the prosecutor and the detective in this case. Appendix M at Exhibits 10-16. These emails show the extent to which Mr. Perkins was involved in this case and would have been useful to the defense in impeaching Mr. Perkins and Ms. Lorega, both of whom claimed in their testimony that Ms. Lorega acted alone in detailing all of the alleged attacks by Mr. McAllister.

Finally, and of upmost significance, is the initial medical examination of Ms. Lorega. This document remains missing, despite numerous attempts by appellate counsel to locate it. Appendix J, paragraphs 3 and 4. The prosecutor acknowledged that the documents exist, and it appears that they would have been available for trial had either defense counsel or the State requested them. The State's failure to locate and utilize

this document raises speculation as to its likely exculpatory nature. This is bolstered by statements in medical notes made during the second examination performed on Ms. Lorega that she was dissatisfied with her first examination. Should this document prove to include a statement that there was no evidence of sexual assault, the withholding of this document would constitute a clear *Brady* violation, and would have changed the outcome of the trial.

B. Eliciting false testimony

A conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. *Mooney v. Holohan,* 294 U.S. 103 (1935); *Pyle v. Kansas,* 317 U.S. 213 (1942); *Curran v. Delaware,* 259 F.2d 707 (1958). The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. *Alcorta v. Texas,* 355 U.S. 28 (1957); *United States ex rel. Thompson v. Dye,* 221 F.2d 763 (1955).

Where a conviction has been obtained using "perjured testimony and ... the prosecution knew, or should have known, of the perjury," the conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury," because the use of such testimony has "involve(d) a corruption of the truth-seeking

function of the trial process." *United States v. Agurs*, 427 U.S. 97, 103-04, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976).

The bar against the use of false testimony to obtain a tainted conviction applies equally to situations in which the false testimony goes only to the credibility of the witness.

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

U.S. v. Wallach, 979 F.2d 912 (2nd Cir. 1992).

As stated by the New York Court of Appeals in *People v. Savvides*, 1 N. Y. 2d 554; 136 N. E. 2d 853, 854-855; 154 N. Y. S. 2d 885, 887 (1956):

> It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

1 N. Y. 2d at 557.

In *Wallach*, the Second Circuit Court of Appeals reversed a conviction based on evidence that one of the key witnesses had lied on the stand about continuing to gamble even after he claimed to quit. The Court relied in part on the "knew or should have known" standard of *United States*

v. Agurs, supra. However, the Court found, "even if the Government had no knowledge of the perjury, reversal was warranted under the standard that where the Government is unaware of a witness's perjury, the conviction must be set aside "if the testimony was material and `the court [is left] with a firm belief that but for the perjured testimony, the defendant would most likely not have been convicted.'" *Wallach,* 979 F.2d at 914, quoting *Sanders v. Sullivan,* 863 F.2d 218, 226 (2d Cir.1988)).

The *Wallach* Court reasoned that the *Sanders* "but for" test was not applicable in the traditional sense, meaning that without the false testimony a conviction would most likely have resulted, as the testimony did not implicate the defendant at all. Instead, the point was that the jury, aware of a falsity in the witness' sworn denial of gambling, "would likely have disbelieved his accusations against Wallach, and disbelief of those allegations would likely have left the jury with other evidence unlikely to have persuaded it beyond a reasonable doubt of Wallach's guilt." *Wallach,* 979 F.2d at 914.

In this case, it is clear from the vast inconsistencies that have already been explained in Ms. Lorega's story, in Mr. Perkins' story, and even in the detective's reports, that the prosecutor should have been aware long before trial that there were problems with the testimony of State witnesses. The ever changing stories of the State's key witnesses are a clear red flag that

those witnesses were changing their stories to their advantage as they had time to do so. Had Mr. McAllister been charged based only on Ms. Lorega's initial statement, and testimony had been limited to that statement, insufficient evidence would have been elicited to support a conviction.

Instead, the prosecution delayed two years in trying this case, time enough for Ms. Lorega to speak at length with her brother-in- law, domestic violence advocates, and the detective about her story, and time enough for her to change her story when those people subtly suggested that such changes would be in her best interest. A review of even one of Ms. Lorega's interviews, where her testimony changes several times over the course of six questions, establishes the falsity of her claims. Appendix K at 22-23.

As in *Wallach,* even if the State had no actual knowledge that its witnesses were lying, the fact that certain statements could be proven to be false by documentary evidence – the claim that Ms. Lorega had made the call to 911, or the claim that she could not understand the Tagalog interpreter when she later admitted she was fluent in that language – should have signaled to the State that her claims were likely not true. Additionally, the State had possession of Mr. McAllister's medical records prior to trial. Even a cursory review of those records demonstrates the impossibility of the vast majority of Ms. Lorega's claims against Mr. McAllister. Appendix W. The State knew, or should have known, that Mr. McAllister was

physically incapable of the alleged assaults, putting the prosecutor on notice that all of Ms. Lorega's testimony in this regard was fabricated. The evidence in this case is such that the prosecution was put on notice well in advance of trial that accounts and testimony given by witnesses was falsified.

C. Facts not in evidence

A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record. *State v. Claflin,* 38 Wash.App. 847, 850-51, 690 P.2d 1186 (1984), *review denied,* 103 Wash.2d 1014 (1985). This rule is closely related to the rule against pure appeals to passion and prejudice because appeals to the jury's passion and prejudice are often based on matters outside the record. *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988) (prosecutor appealed to jury's passion and prejudice by addressing defendant's ties to group that prosecutor characterized as terroristic based on facts outside the evidence); *Claflin*, 38 Wash.App. at 850-51, 690 P.2d 1186 (prosecutor in rape trial read poem to jury that appealed to jury's passion and prejudice and referred to matters outside the evidence). Improper arguments are particularly likely to be prejudicial when the case is a pure credibility contest. *State v. Walker*, 164 Wn. App. 724, 738, 265 P.3d 191 (2011).

The prosecutor improperly argued in closing that Mr. McAllister brought Ms. Lorega to the United States to control her. Appendix K at 644-45. The State used the phrase, "welcome to my parlor, said the spider to the fly," implying that Mr. McAllister was the predatory spider in this scenario. *Id.* at 646:24-25. The State put the jury in Ms. Lorega's place, asking them to imagine being in a country where they didn't speak the language and knew no one. *Id.* at 647. Instead of concluding, as was apparent from the evidence, that Ms. Lorega chose to stay home, the State implied that this action showed his control over her. *Id.* The State claimed that Ms. Lorega was left out in the wilderness with no human contact and unable to speak to or meet anyone but those people allowed by Mr. McAllister, clearly in contradiction to the evidence at trial. *Id.* The State implied that leaving her so isolated was another means of control when it was just the opposite. *Id.* at 647:19-22. When Mr. McAllister was absent, Ms. Lorega was free to leave the house, make phone calls, or do anything else she liked, knowing he would not return for hours.

In short, the State made up a tale, wholly unsupported by the evidence, about Mr. McAllister as a controlling, manipulative person who brought a young woman from the Philippines to be his wife only because he could control her every move and hold her prisoner in his home. The argument was invented to play on the passions and prejudices of the jury.

In *State v. Pierce*, 280 P. 3d 1158 (Div. II 2012), the Court found a prosecutor's argument, made in the first person singular and attributing repugnant and amoral thoughts to the defendant based purely on speculation, was an improper appeal to the passion and prejudice of the jury. *Pierce*, 280 P.3d at 1170. The Court relied on a Second Circuit opinion involving the use of the first person singular through the victim's eyes, noting, "The first person singular rhetorical device had the dual effect of placing the prosecutor in the victim's shoes and turning the prosecutor into [the victim's] personal representative." *Pierce, supra, quoting Hawthorne v. United States*, 476 A.2d 164, 172 (D.C.1984).

The *Pierce* Court reasoned that, if it is improper for the prosecutor to act as the victim's personal representative by stepping into his shoes, it is "far more improper for the prosecutor to step into the defendant's shoes during rebuttal and, in effect, become the defendant's representative," especially considering that the prosecutor's arguments served no purpose but to inflame the jury's prejudice against the defendant. *Pierce,* 280 P.3d at 1170. The Court found that the prosecutor "went beyond his wide latitude in drawing inferences from the evidence by effectively testifying about what particular thoughts Pierce must have had in his head; a matter, as in *Hawthorne*, that was outside the evidence." *Id.*

The Court also considered the prosecutor's account, also in closing, of the victims' murders, finding that the prosecutor went far beyond inferences from the evidence to add inflammatory details, such as claiming that Mr. Pierce told the couple to say their goodbyes before killing them. *Id.* The Court found these "emotionally charged embellishments" were, again, an improper appeal to the jury's sympathies. *Id.*

Finally, the Court found the prosecutor's argument that the victims' would "never in their wildest dreams… or in their wildest nightmare" have expected to be murdered on the day of the crime, an improper appeal to passion and prejudice, serving no purpose but to appeal to the jury's sympathy. *Id.* "That the [victims] would never have expected the crime to occur was not relevant to Pierce's guilt, nor were the prosecutor's assertions about the [victims'] future plans. Moreover, the argument invited the jury to imagine themselves in the [victims'] shoes, increasing the prejudice." *Id.*

However, Mr. Pierce failed to object to the prosecutor's closing argument, and so was required to show that the argument caused prejudice incurable by a jury instruction. *Id.* The Court concluded that in the context of the entire argument and the evidence, Mr. Pierce carried that burden. *Id.* at 1170-71. The Court held that the State's focus on the shocking and unexpected nature of the crimes, coupled with the invitation to the jury to "imagine themselves in the position of being murdered in their own homes,"

and other improper and inflammatory arguments, created more than a substantial likelihood that these arguments affected the verdict. *Id.* at 1171.

Here, much like *Pierce,* the prosecutor's invented arguments in this case attributed motives to Mr. McAllister that were nowhere in the evidence. The prosecutor implied that Mr. McAllister's sole intent was to control Ms. Lorega, calling her a "virtual captive" in his house, claiming that he controlled her "every move," and that she had "nowhere to run, out in the middle of nowhere." Appendix K at 647:11-18. Throughout this objectionable testimony, defense counsel sat, inexplicably mute.

The prosecutor went on to imply that Mr. McAllister was only nice for a few days after Ms. Lorega arrived in the United States because, "now she belongs to him." Appendix K at 648:4-5. According to the State, this was part of Mr. McAllister's overarching plan to control Ms. Lorega for life. *Id.* at 648:6-17. In rebuttal, the prosecutor implied this would be successful because Ms. Lorega was Catholic, and Catholics don't get divorced. *Id.* at 687:10-20. This fact was not only irrelevant, but it was not in evidence anywhere in the case. Though counsel objected, the trial court's only response was to remind the jury that the State's argument was not evidence, an insufficient instruction considering the blatantly improper argument already made. *Id.* at 688:12-13.

Though Mr. McAllister's trial counsel did not object as he should have to the state's closing argument, it is clear that the entirety of this argument was extremely prejudicial and could not have been cured by an instruction. As in *Pierce,* counsel's argument played to the passions and prejudices of the jury, asking them to imagine Ms. Lorega's fear and confusion, being "plucked out of your environment and dropped in a place that you don't know north from south." Appendix K at 647:13-14. Whether or not Ms. Lorega was confused or disoriented was not only not part of the record, but was irrelevant to whether or not Mr. McAllister had actually abused her. Similarly, Mr. McAllister's intent, if any, in leaving Ms. Lorega home while he went to doctor's appointments was not pertinent to the allegations here. The prosecution's entire closing argument was in this vein, magnifying the fear, isolation, and confusion that he claimed Ms. Lorega felt, and the quest for utter control that was Mr. McAllister's supposed motive. The arguments were meant only to inflame the jury and prey on their passions to secure a conviction.

The State crossed the fine line of propriety into inappropriate and inflammatory argument that bore no relevance and only served to put a thumb on the scales of justice. The State's arguments were improper and, like the arguments in *Pierce,* created more than a substantial likelihood that the verdict was impacted by the arguments.

E. CONCLUSION

Between the deficient performance of his own trial counsel and the blatant discovery evidentiary violations committed by the State, it is clear from a reading of the record that there was no choice for the jury but to convict Mr. McAllister, despite Ms. Lorega's allegations that she had been repeatedly kicked in the butt by a disabled man whose disability prevented him from kicking. Had Mr. McAllister had competent counsel who had undertaken a zealous representation and presentation of his case, the outcome would have been quite different. Counsel failed to investigate this case, to prepare for trial, or to obtain and utilize evidence supporting Mr. McAllister's innocence. The resulting miscarriage of justice cost Mr. McAllister his freedom. Counsel's performance was deficient to the point of ineptitude. Mr. McAllister was utterly and completely deprived of his constitutional right to counsel. The verdict should be overturned and this case remanded for a new trial.

Respectfully Submitted this 29 Day of ~~August~~ July, 2016

John C. Cain

John C. Cain, WSBA #16164
Attorney for Mr. McAllister